1998

Russell Johnson, Peter Johnson v. Arthur Stephen Higley, Susan M. Higley : Response to Petition for Rehearing

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

RUSSELL JOHNSON and PETER JOHNSON,	:	
Appellees, Plaintiffs and Counter-Defendants,	:	Case No. 980252 CA
vs.	:	
	:	No Oral Argument Permitted
ARTHUR STEPHEN HIGLEY and SUSAN M. HIGLEY,	:	
Appellants, Defendants and Counter-Plaintiffs.	:	

APPELLEE'S OPPOSITION TO PETITION FOR REHEARING

Appeal from a Decision of the
Third Judicial District Court, Tooele County
Honorable John A. Rokich

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DETERMINATIVE PROVISIONS OF RULES

Rule 35(a), Utah R. App. P.

> A rehearing will not be granted in the absence of a petition for rehearing. A petition for rehearing may be filed with the clerk within 14 days after the entry of the decision of the court, unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires. Counsel for petitioner must certify that the petition is presented in good faith and not for delay. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court. The answer to the petition for rehearing shall be filed within 14 days after the entry of the order requesting the answer, unless otherwise ordered by the court. A petition for rehearing will not be granted in the absence of a request for an answer.

ARGUMENT[1]

Higleys' petition for rehearing should be denied because it raises new arguments and involves factual evidence not in the record. This new theory regarding what interest Wrathall held in the SW 1/4 of the SW 1/4 of Section 20 was not asserted before the trial court and not briefed or argued on appeal.

Rehearing is appropriate only where the Court has "overlooked or misapprehended" points of law or fact in its evaluation of the issues on appeal. Rule 35(a), Utah R. App. P. In order for the Court to overlook or misapprehend points of law or fact, those points must

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[1]Pursuant to the specific request from the Court, Johnsons argue only the issues raised in Section I of Higleys' Petition for Rehearing.

have been presented in the principal briefs. There are at least two reasons for this rule. Rehearing is inappropriate as a means of giving parties a second chance to devise new strategies or theories of their case. Second, allowing a party to argue new issues frustrates the purpose of the trial court and seriously prejudices the opposing parties. This Court has not overlooked or misapprehended anything.

Higleys have mischaracterized their new argument as a standing issue. The obvious reason is to assert a jurisdictional argument the Courts have in the past entertained sua sponte. Under the guise of standing, they confuse the merit of Johnsons' claims with the fundamental right to assert the claims. In other words, they say that since Johnsons' claim of ownership is based on an agreement that has a discrepancy or mistake in the description of the reservoir lands, therefore Johnsons lack the legal standing to even argue a position relative to that agreement.

To carry Higleys' standing argument to its logical conclusion, every time a trial court rules against a party, that party would not only lack standing to have originally asserted those claims (clearly circular logic), but would lack standing to appeal those claims. Further, any party could raise new legal theories for the first time in a petition for rehearing, and if the appellate court agrees with the legal theory, it would become a question of standing. Our system of jurisprudence does not reach this absurd result. Higleys' authorities do not support their argument.

Whether an individual has standing to sue depends upon whether he or she has a "sufficient interest in the subject matter of the dispute and sufficient adverseness that the

legal and factual issues which must be resolved will be thoroughly explored." Terracor v. Utah Bd. of State Lands & Forestry, 716 P.2d 796, 798 (Utah 1986). "[T]he doctrine of standing operates as gatekeeper to the courthouse, allowing in only those cases that are fit for judicial resolution . . . crystalized disputes concerning specific factual issues." Terracor at 798-99. The essence of standing is that a plaintiff "have a personal stake in the outcome of a specific dispute." Id. at 799. Therefore, a plaintiff has standing where he can "show that he has suffered some distinct and palpable injury that gives him a personal stake in the outcome of the legal dispute." Id.

Johnsons asserted their right to the easement in question based upon multiple grounds: (1) an express grant of easement; (2) prescriptive use; and (3) confirmation of the easement by a 1950 court decree. Johnsons have claimed ownership of the Blue Lakes Reservoir for the last 50 plus years. They are the true parties in interest. There was a clear dispute with Higleys over the easement and its scope. This is a "crystallized dispute concerning specific factual issues" giving Johnsons standing to assert their right to the easement. The legal and factual issues were "thoroughly explored" in the trial court as required by Terracor.

Whether there is a legal basis for Higleys to attack the easement agreement is a question that they had a duty to assert in the trial court. The courts rely on the parties to frame the legal arguments and develop testimony and other evidence germane to every issue that is properly raised. The fact that Higleys failed to make their arguments until this point

in the litigation severely prejudices Johnsons because Higleys have totally failed to put on any evidence, and Johnsons had no opportunity to respond.

It is true there is a discrepancy between the legal descriptions set out in the easement deeds and the subsequent easement agreement between Wrathall and Johnson. That does not mean that Johnsons' interest is a nullity. There are numerous plausible explanations, none of which were explored at the trial court below. For example: (1) the easement descriptions from Anderson and Brown may contain a typographical error; (2) the description in the agreement prepared by Wrathall may have a typographic error; (3) Wrathall may have acquired ownership of the SW 1/4 of the SW 1/4 of Section 20 through a separate deed; or (4) Wrathall may have acquired a separate easement from Anderson and Brown covering the SW 1/4 of the SW 1/4. In fact, the 1950 decree even expressly referred to another agreement which recites that Wrathall had owned the entire SW 1/4 of Section 20. See page 6 of Tab 4 to Brief of Appellants. None of the many factual possibilities were explored at trial because of Higleys' failure to raise the issue.

Even if the Court were to find that this new issue creates a jurisdictional standing problem, there is no basis for rehearing this case. Johnsons have a prescriptive right to an easement covering the entire area innundated by the Blue Lakes. Higleys admit that the dike creating Blue Lakes Reservoir has been in place in the SW 1/4 of the SW 1/4 since 1946. See Exhibit A to Appellant's Petition for Rehearing. The trial court entered a finding that water has been stored continuously since 1946 in a manner open, adverse and under a claim of right by Johnsons. See paragraph 14 of the Findings of Fact, Exhibit 2 of

Brief of Appellees. The trial court held that Johnsons acquired an easement through prescriptive use, that Higleys were not bona fide purchasers for value, that Higleys had actual knowledge, and that Higleys had a duty to inquire into the existence of Johnsons' rights to Blue Lakes Reservoir but failed to do so. Id. paragraphs 48 and 49. The outcome in this case would be the same, and a rehearing on this matter would simply be a waste of judicial resources. The Court should, therefore, deny Higleys' petition for rehearing.

CONCLUSION

Higleys' petition improperly raises new issues not previously presented to the trial court or to this Court. Those issues are not jurisdictional. Johnsons are the only claimants as successors-in-interest to the Brown and Anderson easement grants and clearly have standing. Higleys' petition should, therefore, be denied.

RESPECTFULLY SUBMITTED this 13th day of May, 1999.

WILLIAMS & HUNT

By Marc Wangsgard
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 1999, two (2) true and correct copies of the foregoing **Appellee's Opposition to Petition for Rehearing** were mailed by first class mail, postage prepaid thereon, to:

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